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IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1790~~ 70-246

DONALD RICHARD GOULET,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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No. .....

DONALD RICHARD GOULET,

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vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Petitioner, Donald Richard Goulet, prays that a writ of certiorari issue to review the judgment and decision of the Court of Appeal of the State of California, Second Appellate District, entered in the above entitled case on April 15, 1971.

Opinions Below.

The opinion of the Court of Appeal of the State of California for the Second Appellate District is not reported. A copy of the opinion appears in Appendix A hereto. The opinion of the Appellate Department of the Superior Court of the State of California, County of Los Angeles, is not reported. A copy of the opinion appears in Appendix B hereto.

Jurisdiction.

The judgment of the Court of Appeal of the State of California, Second Appellate District (Appendix A), was entered on April 15, 1971. The petition for hearing by the Supreme Court of the State of California was denied on May 13, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented.

Petitioner is an innocent person who is being subjected to the imposition of criminal sanctions under a judgment of conviction obtained contrary to petitioner's legal and constitutional rights. Petitioner has been subjected to such sanctions without the effective assistance of counsel and without the protection of a trial by jury and all other concomitant rights which petitioner never voluntarily and understandingly waived. The questions presented in the light of the undisputed record are:

1. Whether the provisions of California Penal Code §1018 and California Penal Code §311.2, as construed and applied to the petitioner herein to deny petitioner the right to withdraw his plea of *nolo contendere* and interpose a plea of not guilty to the charge made against him, deprive petitioner of his liberty and property without due process of law, deny petitioner the right of trial by jury in a criminal case, deprive petitioner of the right to the effective assistance of counsel, abridge the exercise of freedoms of speech and press and the right to be free from unreasonable searches and seizures, deny the equal protection of the laws, all contrary to the provisions of the First, Fourth, Sixth and Fourteenth Amendments to the United States Constitution.

2. Whether the provisions of California Penal Code §1018 and California Penal Code §311.2, as construed and applied to the petitioner herein to deny petitioner the right to withdraw his plea of *nolo contendere* and interpose a plea of not guilty to the charge made against him prior to sentence, when under an obscenity charge the then counsel for petitioner had actually not seen the motion picture film involved in the criminal proceeding; counsel had not discussed with petitioner the legal elements involved in the charge of obscenity; counsel was unable to advise petitioner whether the motion picture film was entitled to constitutional protection since he had not viewed the film; and counsel had in other respects neither advised petitioner of the legal counsequences of his plea under the obscenity statute, deprive petitioner of his liberty and property without due process of law, deny petitioner the right of trial by jury in a criminal case, deprive petitioner of the right to the effective assistance of counsel, abridge the exercise of freedoms of speech and press and the right to be free from unreasonable searches and seizures, deny the equal protection of the laws, all contrary to the provisions of the First, Fourth, Sixth and Fourteenth Amendments to the United States Constitution.

3. Whether the provisions of California Penal Code §1018 and California Penal Code §311.2, as construed and applied to the petitioner herein to deny petitioner the right to withdraw his plea of *nolo contendere* and interpose a plea of not guilty to the charge made against him prior to sentence, when in fact and in law the motion picture

film which was the subject matter of the charge against petitioner was actually not obscene and was entitled to constitutional protection, deprive petitioner of his liberty and property without due process of law, deny petitioner the right of trial by jury in a criminal case, deprive petitioner of the right to the effective assistance of counsel, abridge the exercise of freedoms of speech and press and the right to be free from unreasonable searches and seizures, deny the equal protection of the laws, all contrary to the provisions of the First, Fourth, Sixth and Fourteenth Amendments to the United States Constitution.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fourth, Sixth and Fourteenth Amendments to the United States Constitution and the provisions of California Penal Code, §§311, 311.2 and 1018, at the time of the plea, are printed as Appendix C hereto.

Statement.

On May 26, 1969, following a seizure of a motion picture film by police officers in a theater located in the City of Pasadena, County of Los Angeles, State of California, a complaint was filed in the Municipal Court of the said Pasadena Judicial District, alleging that petitioner and two other named individuals had willfully, unlawfully and knowingly exhibited such motion picture film in violation of §311.2 of the California Penal Code.

On July 16, 1969, petitioner appeared in the aforesaid Municipal Court by his then attorney, Howard Gershan. The petitioner thereupon entered a plea of

nolo contendere.[1] The aforesaid plea was found acceptable by the court, and the date of sentencing was fixed by the court for August 28, 1969.

How Federal Questions Are Presented.

Shortly after entering the aforesaid plea, and a month before the date of sentence, petitioner, on July 27, 1969, substituted his present attorney and moved the court to withdraw his former plea and to enter a plea of not guilty. Petitioner alleged in a sworn declaration that he entered his plea in ignorance of his constitutionally guaranteed rights; that to the best of his knowledge his prior attorney had never viewed the film involved in the case and had not advised him adequately concerning the constitutionally protected nature of the material. Petitioner alleged that he was advised by his present attorney that the seizure of the film was in violation of the applicable provisions of the United States Constitution; that the film appeared to be protected by the free speech and press provisions of the First and Fourteenth Amendments; that he had not been advised of the necessity for proof by the prosecution of knowledge of obscenity, and that he did not in fact know the material to be obscene, but that his prior attorney had never discussed this aspect of the case with petitioner; that petitioner would not have pleaded guilty if he had been advised by his prior attorney with respect to his rights as aforesaid; and that petitioner had been induced to plead guilty in large part by the hope that his co-defendants would be relieved of the

[1]The legal effect of such a plea is the same as that of guilty, but the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based. California Penal Code §1016(3).

heavy financial and emotional burdens in having to stand trial on the charges. The petitioner stated that he did not believe himself to be guilty of the offense and prayed the court for relief from the plea theretofore entered.

In addition to the aforesaid declaration in support of the motion to withdraw the plea, there was also submitted an affidavit of petitioner's present attorney, stating that petitioner had been advised by said attorney that in his opinon the search and seizure made in the case violated the constitutional provisions of the First, Fourth and Fourteenth Amendments; that the film appeared to be not obscene in the light of decisions of the Supreme Court; and that in the opinion of counsel the conduct of petitioner which formed the basis of his plea was protected by the federal Constitution.

The matter came on for final disposition before the Honorable Warren L. Ettinger, a Judge of the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California, on May 11, 1970. Prior to the aforesaid hearing, and on April 29, 1970, petitioner's prior attorney, Howard Gershan, submitted a sworn declaration in support of petitioner's motion to withdraw his plea of *nolo contendere*. A copy of the declaration of the prior attorney is annexed hereto as Appendix D.

In the appended declaration, the prior attorney declared that he was the attorney of record for petitioner at the time the plea of *nolo contendere* was entered;

that he had not seen the motion picture film charged in the complaint at the time petitioner entered his plea of *nolo contendere;* that prior to the entry of the plea he had not discussed with petitioner the legal requirements which must be met by the prosecution before a motion picture film can be declared obscene; that since he had not viewed the film, he was unable to advise petitioner of the constitutional and legal protections that the film might have under existing law; that he had not advised petitioner of the requirement of proof beyond a reasonable doubt of petitioner's knowledge that the film was obscene; that he had not advised petitioner that the search and seizure involved in the case were probably violative of constitutionally guaranteed rights; and that counsel had not advised petitioner prior to the entry of his plea that if he were to be convicted of a second violation of §311.2 of the Penal Code, any subsequent case could be construed as a felony by the courts rather than a misdemeanor.

On May 11, 1970, at the time of the hearing on the motion to withdraw the plea, the court had not only the aforesaid declaration by prior counsel and all other declarations by petitioner and subsequent counsel, as aforestated, but prior counsel also appeared and took the stand to testify that all the statements made in his declaration in support of the motion to withdraw the plea were true and correct to the best of his knowledge. At the conclusion of the said hearing, the court stated that petitioner had been adequately represented

and that the motion to withdraw the plea should be denied. The court thereupon imposed sentence upon the petitioner and ordered and adjudged that petitioner pay a fine in the amount of $500.00 to the clerk of the court, and if said fine were not paid, petitioner was to serve one day in the county jail for each $10.00 of said fine, not to exceed 50 days. In addition, a penalty assessment of $125.00 was imposed. Payment of the said fine has been stayed pending disposition of these proceedings.

Following the entry of the judgment and order of the Municipal Court of the Pasadena Judicial District, County of Los Angeles, on May 11, 1970, as aforestated, petitioner duly prosecuted an appeal to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. On January 22, 1971, the said Appellate Department rendered its decision, affirming the order of the municipal court (Appendix B). The Appellate Department held that petitioner had had "the benefit of representation and advice of competent counsel" and that the trial court "did not abuse its discretion" in denying petitioner's motion to withdraw his plea. A petition for rehearing and, in the alternative, for certification to the District Court of Appeal was duly filed by petitioner and was denied on February 4, 1971.

The aforesaid ruling of the Appellate Department was made despite petitioner's claims that the refusal to allow the withdrawal of petitioner's plea, when the re-

lief was requested prior to sentencing and was based on ineffective assistance of counsel, deprived petitioner of his constitutional rights under the First, Sixth and Fourteenth Amendments to the United States Constitution. It was further claimed that the motion picture film involved was not obscene but, on the contrary, was expression protected by the free speech and press provisions of the federal and state Contitutions and that the obscenity statute, as construed and applied to petitioner by the judgment of conviction, violated the free speech, due process and equal protection provisions of the state and federal Constitutions.

On April 6, 1971, petitioner filed a petition for writ of prohibition and mandate in the Court of Appeal for the Second Appellate District. The petition set forth all of the aforementioned allegations contained in the petition herein, including the declaration of prior counsel and the opinion of the Appellate Department as annexed hereto, alleged the innocence of petitioner, and requested issuance of the writ in the light of the applicable legal and constitutional principles aforestated.

On April 15, 1971, the Court of Appeal for the Second Appellate District, Division Four, by a *per curiam* opinion, denied the petition for the writ (Appendix A). The court held that in light of the Appellate Department decision, petitioner had failed to state facts sufficient to entitle him to relief. The Court of Appeal disregarded an undisputed record which clearly dem-

onstrated that petitioner had been without the effective assistance of counsel at the time of his plea; that petitioner had never knowingly and intentionally relinquished his constitutional rights to a trial; and that these undisputed facts were plainly averred in the petition and in the transcripts of proceedings.

On or about April 22, 1971, petitioner filed a petition for hearing before the Supreme Court of the State of California after the decision by the aforesaid District Court of Appeal denying the petition for prohibition and mandate. Petitioner contended, among other things, that California Penal Code §1018, which permits the withdrawal of a plea of guilty on application of defendant at any time before judgment, and California Penal Code §311.2, as construed and applied to the petitioner, deprived petitioner of his liberty and property without due process of law, denied the right of trial by jury in a criminal case, deprived petitioner of the right to the effective assistance of counsel, abridged the exercise of freedoms of speech and press and the right to be free from unreasonable searches and seizures, all contrary to the provisions of the First, Fourth, Sixth and Fourteenth Amendments to the United States Constitution. The petition for hearing was denied without opinion on May 13, 1971, by the Supreme Court of the State of California.

REASONS FOR GRANTING THE WRIT.

1. It is undisputed that petitioner's attorney at the time of plea to an obscenity charge had not viewed the motion picture film which was the subject matter of the complaint. It is also undisputed that petitioner was in no respects advised of crucial defenses which he possessed under the law and the Constitution to the charge made against him. Moreover, petitioner had not been advised of the legal consequences which flowed from the plea made by petitioner. The line drawn by the courts between alleged obscene material and constitutionally protected material has been stated to be dim and uncertain. It is impossible to conceive that a court or jury could make a determination with respect to the obscenity or nonobscenity of a motion picture film without viewing the film. It is equally impossible for counsel in an obscenity prosecution to effectively advise the client without viewing the film involved. On the undisputed record, petitioner was denied the effective assistance of counsel. See, *Powell v. Alabama,* 287 U.S. 45; *United States v. Joslin,* 434 F. 2d 526 (D.C. Cir. 1970); *United States ex rel. Kent v. Maroney,* 435 F. 2d 1020 (3 Cir. 1970); *United States v. Simpson,* 436 F. 2d 162 (D.C. Cir. 1970); *Ginsberg v. New York,* 390 U.S. 629, 676-707, opinion of Justice Harlan.

2. The right of an accused to trial by jury has a favored place in the law. The procedural and substantive due process guarantees which are implicit in such a trial are entitled to exacting protection by the courts. The public interest in protecting the right of an accused to such trial, especially in an obscenity prosecution, is great. In the case herein, petitioner's motion to withdraw his plea was submitted before sentencing and

within an extremely short period after his plea of *nolo contendere.* Petitioner cannot be deemed to have intentionally relinquished or abandoned rights to which he was entitled. The undisputed testimony of petitioner's counsel at the time of the plea indicates that petitioner did not understand the meaning of the charge made against him, did not know what acts amounted to being guilty of the charge, nor did petitioner understand the consequences of his plea of *nolo contendere. Boykin v. Alabama,* 395 U.S. 238; *Johnson v. Zerbst,* 304 U.S. 458; *Kadwell v. United States,* 315 F. 2d 667 (9 Cir. 1963); *Spradley v. United States,* 421 F. 2d 1043 (5 Cir. 1970).

3. California specifically provides a right to withdraw a plea prior to judgment (California Penal Code §1018). Plainly, this statutory right is entitled to all legal and constitutional protection. The courts have always drawn a sharp distinction between an application to withdraw a plea prior to sentence and an application made long after judgment has been imposed. Before sentencing, the inconvenience to court and prosecution resulting from a change of plea is ordinarily slight as compared with the public interest in protecting the right of the accused to trial by jury. Indeed, the entire process of plea bargains is undermined and tainted if an application for a withdrawal of a plea made before sentence is denied in violation of legal and constitutional rights and contrary to justice in the particular cause. *United States v. Joslin,* 434 F. 2d 526 (D.C. Cir. 1970); *United States v. Simpson,* 436 F. 2d 162 (D.C. Cir. 1970); *United States v. Norman,* 412 F. 2d 629 (9 Cir. 1969); *Kadwell v. United States,* 315 F. 2d 667 (9 Cir. 1963); *Spradley v. United States,* 421 F. 2d 1043 (5 Cir. 1970); *Kercheval v. United States,* 274

U.S. 220; *United States v. Langford*, 315 F. Supp. 472 (D.C. Minn. 1970); *United States v. Kelly*, 314 F. Supp. 500, 503 (D.C. N.Y. 1970).

The petitioner was entitled, as a matter of constitutional right, to withdraw his plea prior to sentence. Petitioner was denied the effective assistance of counsel, deprived of substantial defenses to the obscenity charge made against him, denied the opportunity to prove that the motion picture film was entitled to constitutional protection, and petitioner was innocent of the charges made against him. The plea was not made with full understanding of the consequences and was based on ignorance and omission. The petitioner never intentionally and voluntarily relinquished his legal and constitutional rights. On the other hand, the record shows no justification for the denial of the application to withdraw the plea. No countervailing interest of the court or prosecution weighed against withdrawal. Refusal to permit withdrawal of the plea was not in conformity with the spirit and letter of the fundamental law.

4. It has been held that "talismanic labels" are not a substitute for a consideration of the legal and constitutional questions raised by an undisputed record. *Cf., New York Times Co. v. Sullivan*, 376 U.S. 254. It is not sufficient, it is submitted, to state that petitioner "understood the consequences of his plea" and had the benefit of representation and advice of "competent counsel" when the record shows without dispute and by the admission of the then counsel that counsel never saw the subject matter of the obscenity prosecution and never advised the petitioner of his legal and constitutional rights.

The courts below ignored the undisputed record which bore the implicit admission of counsel that he had been ineffective in representation of petitioner. It is submitted that the withdrawal of a plea of guilty cannot be denied in any case where it is evident that constitutional rights would be maintained by permitting the defendant to plead not guilty instead. The law seeks no unfair advantage over a defendant, and the Constitution is watchful to see that the proceedings shall be fairly and impartially conducted. In the case herein, petitioner has averred that he is innocent of the charge made against him and he should have a fair opportunity for a defense. No possible injury could have resulted to respondent by allowing petitioner to withdraw his plea and substitute a plea of not guilty. This is a case where the subject matter of the charge made against petitioner involves a motion picture film ordinarily entitled to constitutional protection under the state and federal Constitutions. It has been stated again and again that the rules usually applied in criminal prosecutions are subject to stricter standards and limitations when sought to be applied in the First Amendment area. *Smith v. California,* 361 U.S. 147; *Quantity of Copies of Books v. Kansas,* 378 U.S. 205.

It is submitted, in the light of all the foregoing, that the provisions of California Penal Code §1018 and California Penal Code §311.2, as construed and applied to the petitioner herein, deprive petitioner of his liberty and property without due process of law, deny to petitioner the right of trial by jury in a criminal case, deprive petitioner of the right of effective assistance of counsel, abridge the exercise of freedoms of speech and press and the right to be free from unreasonable seizures, and deny the equal protection of

the laws, all contrary to the provisions of the First, Fourth, Sixth and Fourteenth Amendments to the United States Constitution.

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and ruling of the Court of Appeal of the State of California, Second Appellate District.

Respectfully submitted,

STANLEY FLEISHMAN,
Attorney for Petitioner.

SAM ROSENWEIN,
Of Counsel.

APPENDIX A.

Judgment of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

Donald Richard Goulet, Petitioner, v. Municipal Court of Pasadena Judicial District, County of Los Angeles, State of California, Respondent. People of the State of California, Real Party in Interest. 2d Civ. No. 38231.

Filed: April 15, 1971.

THE COURT:

In light of the decision made by the appellate department of the superior court petitioner has failed to state facts sufficient to entitle him to relief. (*In re Swain*, 34 Cal.2d 300, 304.) The petition is denied.

Files, *P. J.*
Jefferson, *J.*
Kingsley, *J.*

APPENDIX B.

Judgment of the Appellate Department.

In the Appellate Department of the Superior Court of California, County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Donald Richard Goulet, et al., Defendants and; Donald Richard Goulet, Defendant and Appellant. Superior Court No. CR. A. 9507. Trial Court No. M93175.

On Appeal from the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California, Warren L. Ettinger, Judge (311.2(1) PC.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the judgement made and entered in the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed.

MEMO.

As a result of a plea bargain, appellant entered a plea of nolo contendere. The record indicates that he understood the consequences of his plea and had the benefit of representation and advice of competent counsel. The record also indicates that the terms of the plea bargain were put into effect. (For legality of plea bargains, see *People v. West* [1970] .....Cal.3d .....

[..... Cal. Rptr. ....., ... P.2d .....] [Crim. 14,-453].) The trial court did not abuse its discretion in denying appellant's motion to withdraw his plea.

January 22, 1971.

BY THE COURT.

/s/ VASEY.
Acting Presiding Judge.
Wong Judge.
Smith, Judge.

APPENDIX C.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The provisions of the Fourth Amendment to the United States Constitution are:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. The pertinent provisions of the Sixth Amendment to the United States Constitution are:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

4. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

5. California Penal Code §311, at the time of the plea, provided as follows:

> "As used in this chapter:
>
> "(a) 'Obscene' means that to the average person applying contemporary standards, the pre-

dominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

"(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means having knowledge that the matter is obscene."

6. California Penal Code §311.2, at the time of the plea, provided as follows;

"Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

7. California Penal Code §1018 provides in pertinent part as follows:

> "Unless otherwise provided by law every plea must be put in by the defendant himself in open court . . . On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted.
>
> * * *
>
> "This section shall be liberally construed to effect these objects and to promote justice."

APPENDIX D.

Declaration of Howard Gershan.

In the Municipal Court of Pasadena Judicial District, County of Los Angeles, State of California.

People of the State of California, Plaintiff, vs. Donald Richard Goulet, et al., Defendants. No. M-93175. DECLARATION OF HOWARD GERSHAN IN SUPPORT OF MOTION TO WITHDRAW GUILTY PLEA AND TO ENTER PLEA OF NOT GUILTY. State of California, County of Los Angeles—ss.

HOWARD GERSHAN declares as follows:

1. I am an attorney at law, duly licensed to practice in the State of California.

2. I was the attorney of record for Mr. Goulet, the defendant in the within matter, at the time he entered his previous plea in this matter.

3. I had not seen the film charged in the complaint at the time Mr. Goulet entered his earlier plea of guilty.

4. At the time I discussed the case with Mr. Goulet, and at the time of his entering his plea of guilty, I did not discuss with him the legal requirements which must be met by the prosecution before a motion picture film can be declared obscene. In other words, I did not discuss with him the requirements that to be obscene the material in question must: (a) go substantially beyond customary limits of candor in the description of sex or nudity; (b) that the material must have as its predominant theme an appeal to the purient interest of the average person; and (c) that the material must be utterly without redeeming social importance.

5. Moreover, I did not discuss with Mr. Goulet prior to his entry of a plea in this matter the fact that each of the three tests must be met independently of the other two before the material may be declared obscene.

6. Since I had not viewed the film charged herein, I was not able to advise Mr. Goulet of the film's possible protection under the requirements as set out above.

7. Furthermore, I did not advise Mr. Goulet that for him to be found guilty in this matter there would have to be proved beyond a reasonable doubt that he knew the film was obscene at the time it was exhibited.

8. I did not advise Mr. Goulet prior to his entry of a plea of guilty in this matter of the strong probability that the search and seizure involved in his case was violative of constitutionally guaranteed rights in that: there was no prior adversary hearing in the matter; the affidavit in support of the search warrant failed to set forth sufficient facts to support the issuance of a search warrant; and that the seizure of the film was violative of guarantees of the First, Fourth and Fourteenth Amendments to the United States Constitution.

9. I did not advise Mr. Goulet that under the provisions of Section 1538.5 et seq. of the Penal Code, if a motion to suppress the film as evidence were denied he would have a right to appeal that denial through the appellate courts before being required to go to trial in the matter.

10. I did not advise Mr. Goulet prior to his entry of a plea of guilty in this matter that if he were to be convicted of a second violation of Section 311.2 of the

Penal Code that because of this prior conviction any possible subsequent case can be construed as a felony by the courts rather than a misdemeanor.

11. A major factor in a decision to enter a plea of guilty was the statement by the City Prosecutor's office that upon receipt of a plea of guilty the codefendants charged would have their cases dismissed.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on April 29, 1970, at Los Angeles, California.

Howard Gershan

SUPREME COURT, U. S.

Supreme Court, U.S.
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Opposition to Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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IN THE

Supreme Court of the United States

October Term, 1970
No. 1790.

DONALD RICHARD GOULET,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Opposition to Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Respondent prays that a Writ of Certiorari to the judgment and decision of the Court of Appeal of the State of California, Second Appellate District, entered in the above entitled case on April 15, 1971, be denied.

Statement of the Case.

As set forth in the Complaint, *No. M 93175*, a part of the record, Petitioner is charged with exhibiting an obscene film at 2226 East Colorado Boulevard, in the City of Pasadena, California, on May 15, 1969, in violation of Section 311.2, of the California Penal Code, which is set forth in Petitioner's Petition, "Appendix C, par. 6". Petitioner has also quoted the California statutory definition of "Obscene", Sec. 311, in his "Appendix C, par. 5".